IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2008 Session

# THURSTON HENSLEY v. CSX TRANSPORTATION, INC.

**Appeal from the Circuit Court for Hamilton County**
**No. 02C153 Jacqueline E. Schulten, Judge**

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**No. E2007-00323-COA-R3-CV - FILED APRIL 3, 2008**

## OPINION AND ORDER ON PETITION FOR REHEARING

Appellant CSX Transportation, Inc. ("Railroad") has filed a petition for rehearing pursuant to the provisions of Tenn. R. App. P. 39. Railroad argues that this court misstated facts related to our holding that the trial court properly directed a verdict in favor of Thurston Hensley ("Employee") on the statute of limitations issue. We stated in our opinion that "no evidence was presented" linking Employee's headaches to his claimed toxic encephalopathy. Railroad points us to several pieces of evidence that it says we overlooked. Having reviewed Railroad's memorandum and the accompanying evidence, we conclude that Railroad is correct that we misstated certain facts and conclusions. However, our holding remains unchanged, as will be explained herein. We adhere to our ruling that the directed verdict was properly granted.

To prove that Employee's action is time-barred, Railroad must establish that, prior to January 10, 1999, Employee knew or should have known both of "the critical facts: (1) that he had [the claimed] illnesses,[1] and (2) that they were caused by Railroad." Because there is no evidence that Employee knew he had toxic encephalopathy until he was diagnosed in May 2000, Railroad necessarily relies on the "duty to investigate" rule – *i.e.*, that Employee "should have known" he had encephalopathy because he had sufficient knowledge of existing symptoms to trigger a duty to investigate those symptoms, which investigation would have revealed the full extent of his illness. At issue on this petition for rehearing is whether the evidence of Employee's pre-1999 knowledge of his headaches, coupled with the newly highlighted evidence of an actual symptomatic link between headaches and toxic encephalopathy, creates a fact issue regarding whether Employee's pre-

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[1] The "illnesses" in question are toxic encephalopathy and asbestosis. Railroad's petition for rehearing relates only to encephalopathy. Our conclusions regarding asbestosis are not implicated by the facts and arguments raised by Railroad in the petition and accompanying memorandum.

1999 knowledge meets the first prong of the "critical facts" test.[2] If the answer is yes, a directed verdict would be inappropriate.

We upheld the trial court's directed verdict on the basis of the following rationale stated by the trial court in a memorandum opinion:

> [Employee's] first symptoms, if I'm not mistaken, were headache[s][3] . . . Certainly as I remember the proof, that was not classic symptoms of [toxic encephalopathy]. I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that . . . headaches could be a problem. If my recollection of the proof is correct, [and] I stand to be corrected, that's what I'm going to rule on that.

As we noted in our opinion, Railroad did not seek to "correct" the trial court on that point. Moreover, in its briefs on appeal, Railroad stated that Employee's "belief of a link" between headaches and solvent exposure was "incorrect." Thus, it appeared to us that Railroad was conceding that headaches are not a symptom of encephalopathy.[4] We deemed this purported lack of a link between the symptom and the illness "crucial" for statute of limitations purposes, "because Railroad's argument relies heavily upon testimony that Employee was urged by fellow employees and by his wife to see a 'poison doctor' for his headaches[.]" Absent that testimony, we held, Railroad could not hope to prove that a duty to investigate arose prior to 1999.

Some language in our opinion appeared to suggest that the purported lack of an evidentiary link between headaches and encephalopathy was itself a dispositive fact. Therefore, Railroad now

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[2] As to the second prong, we wrote in our opinion that there was no evidence coupling Employee's knowledge of his *non-headache* symptoms with "knowledge sufficient to put him on notice of a connection between *those* symptoms and his work for Railroad." The resolution of this issue is arguably different, however, with regard to the headaches. Although "mere suspicion of an injury['s] . . . probable cause, standing alone," does not satisfy the second prong, ***Gay v. Norfolk & W. Ry. Co.***, 483 S.E.2d 216, 217 (Va. 1997), the prong may arguably be satisfied by the combination of: a) testimony that Employee suspected his headaches were work-related, and b) testimony that his co-workers urged him to see a "poison doctor" because of the headaches. However, we do not so hold. Rather, we do not decide this issue because the absence of the first prong is dispositive.

[3] The court actually said "headache and bloating." However, Railroad's memorandum in support of its petition for rehearing explicitly concedes, for present purposes, the issue of bloating. Railroad argues that this court erred with regard to headaches only. Thus, for ease of understanding, we have deleted references to bloating – inserting ellipses as needed – in this quotation and several quotations that follow.

[4] Of course, Railroad disputes basically the entire factual underpinning of Employee's case, including the very notion that he has encephalopathy at all – while simultaneously arguing that if, *arguendo*, Employee has encephalopathy, he should have known about it prior to January 10, 1999. Because of these mutually exclusive factual contentions, Railroad at times walks a thin line between conceding points and arguing them in the alternative. For this reason we have chosen not to reject Railroad's argument on the basis of its apparent prior concession of the point, and will proceed to address the substance.

points us to several items of evidence – originally offered in support of *Employee's* case – that contradict our statement that "[t]here is absolutely no evidence linking his headaches . . . to [encephalopathy]." We concede that this was a misstatement. There was indeed evidence in the record linking headaches to encephalopathy. However, this is only a threshold question, not the core issue, and to the extent our opinion suggested otherwise, we erred. The core issue is whether Employee had the requisite knowledge of the claimed illness, *i.e.*, encephalopathy.

It is crucially important to distinguish between Employee's *knowledge of headaches* and his *knowledge of encephalopathy.* Headaches are one of many symptoms of encephalopathy, and they are also a symptom of many other conditions. Railroad seizes on our statement that "[i]f Employee were suing for damages caused by his headaches . . . his action might well be time-barred; certainly under that scenario a fact issue for the jury would have been created." Railroad suggests that this language means we must now declare that a jury issue has indeed been created, since Railroad has pointed us to evidence of a link between encephalopathy and headaches. But we did not say that evidence of a link between encephalopathy and headaches would create a jury issue. We said that a jury issue would exist "[i]f Employee were suing for damages caused by his headaches" – that is to say, if the fundamental basis of his claim was *headaches*, rather than encephalopathy, a very serious disease of which headaches are but one symptom.

In order to create a jury issue, Railroad must cite material evidence that Employee had, or may be charged with, knowledge of encephalopathy, not merely of headaches.[5] Knowledge of headaches is relevant only if it helps establish that Employee "kn[e]w enough to prompt a deeper inquiry" into the cause of the headaches, ***Nemmers v. United States***, 795 F.2d 628, 631 (7th Cir.1986), and in turn, this "deeper inquiry" is relevant only if it would have revealed the headaches' cause to be encephalopathy. Needless to say, if there was no evidence that the headaches were in fact caused by encephalopathy, then no jury could reasonably conclude that a deeper inquiry would have revealed such a causal link. That was the basis for our original ruling on this point. However, although we now reverse that portion of our ruling, our reversal establishes only that the"deeper inquiry" is *relevant* – not that Employee knew enough to prompt it. We now turn our attention to this latter point.

In its memorandum opinion, the trial court stated, "I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that . . . headaches could be a problem." The statement goes to the core of the issue. Employee is not suing Railroad for mere headaches; he is suing Railroad for a much broader and more serious illness. Headaches are indeed a symptom of that illness, but they are also a symptom of countless other illnesses. Does the mere fact that a person has a single discrete symptom, such as headaches, trigger such a broad duty to investigate that it starts the clock running on any subsequently discovered illness of which headaches are arguably a symptom – no matter how unforeseeably serious that illness might be? We think not.

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[5] Concededly, we failed to properly emphasize this distinction when we stated in our opinion that "Railroad's argument fundamentally rests upon the notion that Employee knew or should have known that his headaches . . . were work-related."

The duty to investigate is, as we stated in our opinion, "condition-specific." It follows logically that there must be some reasonable relationship between the symptoms complained of and the condition underlying the cause of action, such that the discovery of the symptoms reasonably places the plaintiff on notice that he might have a more serious condition which merits further investigation. Indeed, this conclusion is mandated by the "principle that the statute starts to run when a reasonable person would know enough to prompt a deeper inquiry into a potential cause." ***Nemmers***, 795 F.2d at 632. No duty to investigate arises if a reasonable person would not, upon experiencing the symptom in question, reasonably suspect that something is seriously wrong that requires further investigation. Thus, the mere fact that an objective link between a symptom and a condition can be retroactively established does not necessarily mean that the discovery of the symptom triggered a duty to investigate as to the condition. For instance, a plaintiff with mild congestion that most reasonable people would dismiss as the likely symptom of a head cold is not necessarily placed on immediate constructive notice that he has a nascent case of severe pneumonia. The symptoms must rise to a certain level of seriousness and apparent relatedness before they trigger a duty to investigate that implicates the subsequently-discovered condition.

This does not mean, of course, that Employee's duty was triggered only when he became aware of every single symptom, or when he knew that those symptoms might mean he had encephalopathy. Such a holding would defeat the purpose of the "duty to investigate" rule altogether. However, again, the condition-specific nature of the duty means there must be some reasonable nexus between the symptoms in question and the ultimate diagnosis at issue. We recognize that headaches – in addition to being symptomatic of countless other conditions, of various levels of seriousness – are a possible symptom of encephalopathy. Yet we agree with the trial court that headaches, by themselves, do not necessarily create knowledge of encephalopathy, constructive or otherwise. We interpret the court's statement that "with this big of a disputed and complicated diagnosis . . . [none] of us would have known that . . . headaches could be a problem" as a holding that no reasonable juror could conclude from this evidence that the headaches, standing alone, created a duty to investigate *vis a vis* the toxic encephalopathy. We concur with this holding. It is for this reason that we do not change our judgment in this case.

The petition for rehearing is denied with costs associated with the petition taxed to the appellant, CSX Transportation, Inc.

IT IS SO ORDERED.

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CHARLES D. SUSANO, JR., JUDGE

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SHARON G. LEE, JUDGE

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NORMA McGEE OGLE, SPECIAL JUDGE